80-1156

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO:_____

JAMES W. GIBBS, Petitioner

v.

JOHN WELSH and FLO-START, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether The Due Process Clause of The Fourteenth Amendment has been violated where, for purposes of invoking in personam jurisdiction, the quality and nature of the evidence examined by a court demonstrates that a nonresident's contacts with a forum state are so minimal as to offend traditional notions of fair play and substantial justice.

TABLE OF CONTENTS

	Page
Question Presented	1
Table of Contents	2
Table of Authorities	4
Opinions Below	5
Jurisdiction	5
Constitutional and Statutory Provisions Involved	6
Statement of the Case.	8
Reasons for Granting the Writ	14
1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS CONCERNING WHAT FACTORS WILL CONSTITUTE SUFFICIENT MINIMUM CONTACTS NEEDED TO CREATE IN PERSONAM JURISDICTION AND SATISFY TRADITIONAL FOURTEENTH AMENDMENT DUE PROCESS NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE	14
A. THE EXTENT TO WHICH THE CONNECTION BETWEEN A FORUM STATE AND A NONRESIDENT BECOMES TOO ATTENUATED, UNDER THE STANDARDS IMPLICIT IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, TO JUSTIFY IMPOSING UPON THE NONRESIDENT THE BURDEN AND INCONVENIENCE OF LITIGATING IN THE FORUM STATE. .	15
B. TO WHAT EXTENT A SPECULATIVE, PROSPECTIVE IMPACT UPON THE COMMERCE OF THE FORUM STATE	

Page

SHOULD BE CONSIDERED IN ESTABLISHING IN PERSONAM JURISDICTION WHERE THERE HAS BEEN NO SHOWING THAT PETITIONER'S ACTIONS AFFECTED AN ONGOING BUSINESS OPERATION WHICH HAD A DIRECT, REALISTIC IMPACT UPON THE COMMERCE OF THE FORUM STATE 19

C. WHETHER IN A MOTION TO DISMISS FOR LACK OF IN PERSONAM JURISDICTION, ALLEGATIONS OF A COMPLAINT CAN BE CONSIDERED BY A COURT WHERE BOTH PARTIES HAVE SUBMITTED AFFIDAVITS WHICH MATERIALLY CONTRADICT THE ALLEGATIONS 23

Appendix 28

1. Opinion and Judgment of Court of Appeals 28

2. Opinion and Judgment of District Court. 50

3. Complaint 62

4. Affidavits in Support of Petitioner's Motion to Dismiss and to Quash Service of Process. 71

5. Affidavit of Respondent 80

TABLE OF AUTHORITIES

Page

Constitutional Provisions:

U. S. Const. Amend. XIV §1 . . 6, 15

Statutes

Ohio Revised Code § 2307.382 . 7, 11

CASES:

Great Western United Corp. v. Kidwell, 577 F 2d 1256 (5th Cir. 1978) 20

Hanson v. Denckla, 357 US 235 (1953) 18

In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F 2d 220 (6th Cir. 1972) 20

International Shoe Co. v. Washington, 326 US 310 (1945). 15

Kulko v. California Superior Court, 436 US 84 (1978). . . . 18

Shaffer v. Heitner, 433 US 186, 97 S. Ct. 2569 18

Southern Machine Co. v. Mohasco Industries, Inc., 401 F 2d 374 (6th Cir. 1968) 20, 21

OPINIONS BELOW

The opinions of both the Court of Appeals for the Sixth Circuit and The District Court for The Northern District of Ohio (Eastern Division) appear in the Appendix hereto.

JURISDICTION

The judgment of The Court of Appeals for the Sixth Circuit was entered on October 2, 1980. A timely petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Amendment, XIV, §1

All persons born or naturalized in The United States and subject to the jurisdiction thereof, are citizens of The United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or imunities of citizens of The United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code § 2307.382
Long-Arm Statute
Personal Jurisdiction

"(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state;..."

STATEMENT OF THE CASE

Petitioner, James W. Gibbs is a citizen of the state of Florida. John Welsh and Flo-Start, Inc., the Respondents herein, are residents of Ohio and have their principal places of business in that state. A dispute developed as a result of events, outlined below, which culminated in the execution of a written contract on October 31, 1974 whereby Petitioner Gibbs sold to Respondent Welsh an electrical contact unit which Petitioner had invented.

The initial contact between the parties was in early 1974 when Petitioner Gibbs called Respondent Welsh concerning the possible sale of the invention. As a result of this communication, Respondent Welsh made a trip to Florida to discuss

the product with the Petitioner. Subsequently, in or about August, 1974, Respondent Welsh was again contacted by the Petitioner. Respondent Welsh thereupon made another trip to Florida to discuss the possible purchase of the invention. It was at this second meeting in Florida that Welsh claims material misrepresentations were made by Petitioner Gibbs.

In early September Petitioner Gibbs delivered a prototype of the invention to Respondent Welsh in Ohio. Respondent Welsh did not have an ongoing manufacturing concern at this point in time. As a result, prior to the execution of the final contract the Respondent, Flo-Start, Inc., was incorporated on October 1, 1974. The next meeting between the parties was in Florida and extended over several days. Finally, on a return trip, the contract was signed in Florida. Respondent Welsh and his agents remained there to make contact with other firms to do

developmental work. Under the terms of the contract, Petitioner was required to assist in the development of the product for thirty days in Akron or elsewhere; in fact, Petitioner spent sixty days in Florida working with a Florida firm hired by the Respondents to develop the product.

At the time of the execution of the contract, the Respondents did not have an ongoing manufacturing concern. Respondents have not marketed the product in Ohio or elsewhere and claim that they were unable to develop same. Petitioner is an individual and the business facilities that he maintained were located in Florida. Petitioner retained no control over future development or sale of the product.

On March 15, 1978, Respondents brought the instant action against the Petitioner for fraudulent misrepresentation and breach of contract in The United States District Court for The Northern District of Ohio (Eastern

Division). It was alleged in the complaint that the nature of Respondent's claim arose from tortious injuries caused by the Petitioner's acts or omissions in Ohio. Personal jurisdiction over the Petitioner was asserted under the Ohio long-arm statute, Ohio Revised Code § 2307.382. Petitioner Gibbs subsequently moved to dismiss for lack of personal jurisdiction under Rule 12 (b)(2) of the Federal Rules of Civil Procedure. The District Court granted the Petitioner's motion based upon the receipt and consideration of affidavits from both parties which revealed that:

1. "...There has been no showing that the business operations of the Plaintiffs (Respondents) have had a realistic impact on the commerce of the state of Ohio" (App. 56).

2. "Plaintiffs (Respondents) have further failed to show that the claim arose from defendant's (Petitioner's) activities in Ohio..." (App. 57).

3. "...The quality and frequency of defendant's (Petitioner's)

> contacts with Ohio viewed in their overall context will not sustain the exercise of jurisdiction over the defendant's (Petitioner's) person" (App. 58).

The Sixth Circuit Court of Appeals reversed and remanded for further proceedings. It found that it was not necessary that the alleged misrepresentations had a realistic impact upon an existing Ohio business, but that it was sufficient to show that if the invention had been as represented it would have added appreciably to the commerce of Ohio (App. 43).

The Complaint of Respondents in separate paragraphs alleged that Petitioner had caused torious injuries by acts or omissions in Ohio; (App. 63) had demonstrated the invention and thus provided an appearance of successful operation, (but does not state where this occurred); (App. 66), and had made misrepresentations (but does not state where these occurred (App. 66). Petitioner's affidavit denied causing

Respondents any tortious injury in the State of Ohio by any act or omission within or without the State of Ohio (App. 71). Respondents' affidavit alleged misrepresentations committed by Petitioner in Florida, but did not allege Petitioner committed any tortious acts in Ohio (App. 90,91). The Court of Appeals held that, based on a reading of both the pleadings and affidavits, the Respondents had established a prima facie case of personal jurisdiction over the Petitioner by "...alleging a series of misrepresentations, some of which were made in Ohio" (App. 44).

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS CONCERNING WHAT FACTORS WILL CONSTITUTE SUFFICIENT MINIMUM CONTACTS NEEDED TO CREATE IN PERSONAM JURISDICTION AND SATISFY TRADITIONAL FOURTEENTH AMENDMENT DUE PROCESS NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

The opinion of the Sixth Circuit in the present case demonstrates that there continue to remain important, unresolved issues of federal importance regarding the degree of minimum contacts needed to invoke in personam jurisdiction as well as what evidence a court may examine in making this determination.

Because this Court has not had an opportunity to address itself to the specific matters addressed herein, there are com-

pelling reasons why guidelines should now be marked: the exercise of in personam jurisdiction based upon a state's long-arm statute is of common if not increasing occurrence. As a result, a more definitive indication of what criterion a court may examine in ascertaining whether the exercise of in personam jurisdiction would violate the Due Process Clause of the Fourteenth Amendment is warranted.

Among the significant and recurring questions are:

A. THE EXTENT TO WHICH THE CONNECTION BETWEEN A FORUM STATE AND A NONRESIDENT BECOMES TOO ATTENUATED, UNDER THE STANDARDS IMPLICIT IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, TO JUSTIFY IMPOSING UPON THE NONRESIDENT THE BURDEN AND INCONVENIENCE OF LITIGATING IN THE FORUM STATE.

The application of the minimum contacts test set out in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and expanded

by subsequent cases suggests that, although the test is not to be mechanically applied, there are instances in which contacts between a forum state and a nonresident are so slight as to render unreasonable the assertion of in personam jurisdiction over the nonresident. The discretion permitted lower courts in determining to what degree minimum contacts will satisfy the mandate of due process is accepted; however, the facts and opposing results found in the present case are common and suggest the desirability of this Court establishing guidelines so that both litigants and lower courts may properly gauge considerations deemed to be acceptable or unacceptable in determining whether sufficient minimum contacts have been established over a nonresident so as to satisfy the demands of due process.

The facts in the present case indicate that such a connection has not been established between the Petitioner and the forum

state as to make it just, fair, or reasonable to have required defense of the action in the forum state. For example, major factors relied upon by the District Court in concluding that the Petitioner was not subject to in personam jurisdiction include:

1. The alleged statements of misrepresentation of which Respondents complain occurred in Florida where the subject contract was signed by all parties.

2. The Respondents neither had an ongoing business concern in Ohio nor was any product manufactured or sold as a result of the sale of the invention from the Petitioner to the Respondents.

3. The Petitioner retained no contract over the future development or sale of the product.

4. The Petitioner is an individual, with no business in Ohio and with no substantial involvement in interstate commerce.

Prior cases of this Court suggest that the presence of these factors militate against the establishment of in personam jurisdiction since the connection between the forum state and the nonresident,

characterized by the District Court as "casual" (App. 59), is such as to require the Petitioner to conduct his defense in the forum state would be unfair and unreasonable Kulko v. California Superior Court, 436 US 84, 96, 97 (1978); Shaffer v. Heitner, 435 US 186, 207-212 (1977); Hanson v. Denckla, 357 US 235, 252 (1953).

The record indicates quite plainly, and the District Court so found, that in weighing the facts of this case as well as the requisite "affiliating circumstances," see Hanson, 357 US at 246, the exercise of in personam jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. The refusal of the Sixth Circuit Court of Appeals to respect those facts and those findings demonstrates the desirability of more pronounced guidelines to be set forth by this Court in defining the quality and nature of a nonresident's activity which

would subject an individual to in personam jurisdiction within the strictures of the Due Process Clause.

B. TO WHAT EXTENT A SPECULATIVE, PROSPECTIVE IMPACT UPON THE COMMERCE OF THE FORUM STATE SHOULD BE CONSIDERED IN ESTABLISHING IN PERSONAM JURISDICTION WHERE THERE HAS BEEN NO SHOWING THAT PETITIONER'S ACTIONS AFFECTED AN ONGOING BUSINESS OPERATION WHICH HAD A DIRECT, REALISTIC IMPACT UPON THE COMMERCE OF THE FORUM STATE.

In the present case, Petitioner merely sold his idea, the subject of a pending patent, to the Respondents. The latter formed a corporation to refine the invention and then to produce and market inventions based thereupon if the invention was perfected. Production was contingent upon further refinement, as evidenced by these facts: (1) That under the contract, Petitioner was to spend ten (1) days in Akron or elsewhere to assist in "perfecting the working

model" of the invention; (2) that, in fact, Petitioner worked on development with Florida engineers hired by the Respondent for sixty (60) days; and, (3) that the contract contemplated that if Respondents' determined operations would not be profitable, they could discontinue and reassign any patents to the Petitioner.

Thus, any prospective impact upon the commerce of Ohio was at best speculative and, further, even had the model been perfected and marketed, such result was dependent upon the acts of the Respondents, not the Petitioner. Petitioner's sole responsibility was the disclosure and assignment of any new inventions to Respondents. In contrast, the contacts in such cases as Great Western United Corp., v. Kidwell, 557 F 2d 1256 (5th Cir. 1978), In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F 2d 22D (6th Cir. 1972); and Southern Machine Co. v. Mohasco Industries, Inc., 401 F 2d 374 (6th Cir. 1968)

were made with ongoing concerns, already engaged in manufacturing in the forum state.

In defining what would constitute sufficient minimum contacts in such a business setting, for example, the Sixth Circuit found in Southern Machine Co., that:

> "Business is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences with that state." Southern Machine Co. at 382-83 (emphasis added)

In initially applying the first part of this test, the District Court found that Petitioner's actions with the present case had no such impact on Ohio's commerce.

Nonetheless, the Sixth Circuit Court of Appeals rejected this contention and stated: "If the invention had been what the plaintiffs (Respondents) allege the defendant (Petitioner) represented it to be, Flo-Start, Inc.

(Respondent) would have added appreciably to the commerce of Ohio."

A resort to such speculation in order to satisfy the minimum contacts requirement acknowledges, in essence, that there have been no foreseeable effects which occurred in the forum state nor has there been sufficient purposeful activity undertaken by the Petitioner to warrant a finding of jurisdiction over him.

It is accepted that inquiry into whether the exercise of personal jurisdiction is permissible in a particular case should depend upon the facts of each case; however, when there is such a blatant discrepancy as in the positions taken by the two lower courts in the present case, clarification by this Court is warranted. There is, moreover, a present need for this Court to define more precisely the considerations, such as prospective as opposed to realistic impact on commerce, which lower courts should look

to in determining whether there has been a sufficient showing of minimum contacts to establish in personam jurisdiction.

C. WHETHER IN A MOTION TO DISMISS FOR LACK OF IN PERSONAM JURISDICTION, ALLEGATIONS OF A COMPLAINT CAN BE CONSIDERED BY A COURT WHERE BOTH PARTIES HAVE SUBMITTED AFFIDAVITS WHICH MATERIALLY CONTRADICT THE ALLEGATIONS.

The opposite results reached by the lower courts in the present case in deciding the question of in personam jurisdiction were, admittedly, a consequence of their decision to examine varying written materials. For example, the District Court found that Respondents failed to establish in personam jurisdiction by not characterizing their claim as arising out of the activity of Petitioner Gibbs in Ohio. This finding was a result of the reading by the District Court of the affidavits submitted by the

parties which, according to that Court, clearly demonstrated that any alleged misrepresentation by the Petitioner was made in Florida. In essence, the District Court did not permit the Respondents to rest upon the allegation of jurisdiction set forth in their pleadings but, rather, determined that since the Respondents had failed, by affidavit, to show in personam jurisdiction, a motion to dismiss must be granted.

The Sixth Circuit Court of Appeals, however, looked to the complaint in conjunction with the submitted affidavits and, as a result, found that the Respondent had alleged a series of misrepresentations, some of which were made in Ohio. On this basis, the Court found personal jurisdiction and reversed the judgment of the District Court.

Petitioner submits that the District Court's approach was the proper one and that the Court of Appeals erred. Clearly, an

allegation of a pleading that is contraverted by a sworn affidavit should not be given credence. The party who made the allegation in the pleading should be required to meet the opposing affidavit head on by also filing an affidavit setting forth his claim.

Here, Respondents' Complaint alleges that Petitioner has caused tortious injuries by acts or omissions in Ohio. The Complaint alleges that Petitioner demonstrated the invention and thus provided an appearance of successful operation, but does not state where this demonstration occurred. Further, the Complaint alleges misrepresentations upon the part of Petitioner, but does not state where these occurred. The Court of Appeals has chosen to infer that these occurred in Ohio. Petitioner submits that neither of these inference are warranted.

Petitioner submits further that these inference are irrelevant, even if warranted. Petitioner's affidavit states in paragraph

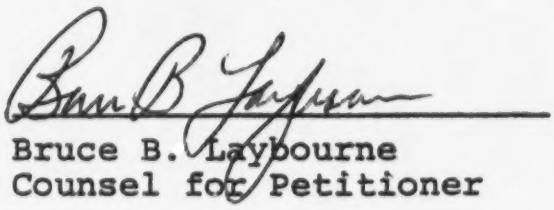
one that he denies causing any tortious injury by any act or omission committed within or without the State of Ohio. Respondents' affidavit filed in response does allege misrepresentations were made in Florida, but makes no claim of any wrongdoing occurring in Ohio.

These contradictory results demonstrate that the question of personal jurisdiction should not be subject to such discretionary determinations, especially where the rights of litigants may be adversely affected. Accordingly, there is a need for this Court to provide guidelines regarding the mode of examining written materials when determining an issue of in personam jurisdiction.

It is important that this Court clearly establish that contentions made in pleadings must fall when faced with affidavits which controvert them. This type of holding may seem simplistic; but what has occurred here makes it clear that it is necessary.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,



Bruce B. Laybourne
Counsel for Petitioner

January 12, 1981

A P P E N D I X

No. 79-3016

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN WELSH and FLO-START, INC., Plaintiffs-Appellants, v. JAMES W. GIBBS, Defendant-Appellee,	Appeal from the United States District for the Northern District of Ohio

Decided and Filed October 2, 1980

Before: LIVELY and ENGEL, Circuit Judges; and BALLANTINE, * District Judge.

LIVELY, Circuit Judge. In this diversity case the district court determined that it lacked personal jurisdiction over the defendant and dismissed the complaint. We

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* The Honorable Thomas A. Ballantine, Jr., Judge, United States District Court for the Western District of Kentucky, sitting by designation.

reverse and remand for further proceedings.

I.

The plaintiffs are an individual citizen and resident of Ohio and an Ohio corporation. The defendant is a citizen and resident of Florida. On October 31, 1974 plaintiff Welsh and defendant Gibbs executed a written contract whereby Gibbs sold to Welsh "a novel switch or electric control unit," which James Gibbs and his brother[1] had invented. Included in the same were all patent rights, trade secrets and "knowhow" pertaining to the invention. The complaint in the district court sought damages for misrepresentations and breach of contract. Personal jurisdiction over the defendant was asserted under the Ohio long-arm statute.[2]

---

[1]James Gibbs's brother had assigned all his interest in the invention to the defendant.

[2]The relevant portion of Ohio's long-arm statute, ORC§2307.382, is as follows: (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state...

At the time of execution of the contract the invention though patented, had not been perfected. The agreement provided that Gibbs would cooperate with Welsh in developing the invention, and specifically that he would work, free of charge, for ten days in "Akron, Ohio or elsewhere" perfecting a working model and preparing a production model. In the contract Welsh agreed to form an Ohio corporation which was to be devoted solely to production and marketing of the invention, including the sale of franchises and establishment of distributorships. The plaintiff Flo-Start, Inc. is that Ohio corporation. Gibbs agreed to answer questions asked by representatives of Welsh and Flo-Start, Inc. "Which may advance their technical understanding of said switch invention and its operation and enable them to perfect a production model thereof." In addition to the patented invention, the sale included other inventions and discoveries

claimed to have been made by Gibbs which were related to the basic invention. The defendant agreed to cooperate with the plaintiff in obtaining patents and developing these claimed inventions. The contract also provided that in the event of disagreement it would be construed according to the law of Ohio.

The agreement of October 31, 1974 was executed by both parties in Florida. The contacts and negotiations between the parties which preceded the signing of the agreement were described by the district court as follows:

> The first contact between the parties was in early 1974 when the defendant Gibbs called plaintiff Welsh about an electrical control unit he had developed to control electrically operated carts, trucks, and other vehicles. Plaintiff Welsh made a trip to Florida to discuss the invention with the defendant. Later in 1974 the defendant again called the plaintiff who made another trip to Florida to discuss possible purchase of the invention. According to the affidavit filed by plaintiff Welsh, it was at this second meeting in mid-August 1974

> that material representations were made by the defendant which were subsequently discovered to be false. The alleged misrepresentations are the basis of the present suit. (The defendant's affidavit describes a third meeting in Florida between plaintiff's agents, plaintiff's attorney and patent attorney, and defendant, his attorney and patent attorney.)
>
> The next contact between the parties was in early September when defendant brought a proto-type of the invention to plaintiff Welsh in Ohio. After signing a non-disclosure agreement in Akron, the defendant returned to Florida with the model. Plaintiff and defendant next met in Florida for negotiations extending over several days. Finally, plaintiff Welsh and his agents returned to Florida and signed the contract of sale.

The district court also noted that the plaintiffs selected a Florida engineering firm to assist in developing the invention and that Gibbs worked with that firm for 60 days rather than going to Akron for ten days work as required by the contract.

II.

The district court found that the defendant initiated the contract negotiations with Welsh in Ohio and entered into

a contract which contemplated the formation of an Ohio corporation. These facts led to the further finding that "defendant purposely availed himself of business contacts and opportunities in the State of Ohio, and defendant could reasonably have foreseen that the transaction would have consequences in that state." Dismissal was based on the district court's further findings: (1) "...there has been no showing that the business operations of the plaintiffs have had a realistic impact on the commerce of the state of Ohio"; (2) "Plaintiffs have further failed to show that the claim arose from defendant's activities in Ohio..."; and (3) "...the quality and frequency of defendant's contacts with Ohio viewed in their overall context will not sustain the exercise of jurisdiction over the defendant's person." In making these findings, the district court referred to this Court's decisions in Southern Machine Co. v.

Mohasco Industries, Inc., 401 F 2d 374 (1968), and In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F 2d 220 (1972).

Before ruling on the defendant's motion to dismiss, the district court received affidavits from the parties. There was no hearing on the motion. The procedure to be followed in deciding a motion to dismiss for lack of jurisdiction was outlined by the Seventh Circuit in United States v. Nall, 437 F 2d 1177 (1971), as follows:

> Rule 12(d), Federal Rules of Civil Procedure, enables a party asserting certain defenses enumerated in subsection (b) of that rule to raise such challenge prior to trial on the merits. The rule clearly contemplates hearing and determination of jurisdictional issues in advance of trial. 2A Moore, Federal Practice ¶12.16, at 2352-54 (2d ed. 1968). "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." Gibbs v. Buck,307 US 66, 71-72, 59 S.Ct. 725, 729, 83 L.Ed. 1111 (1939). When considering a challenge to its jurisdiction, a court may receive and weigh affidavits. 5 Wright and Miller, Federal Practice and Procedure § 1351, at 565 (1969).

> Based upon evidence obtained, the court properly decides jurisdictional disputes before trial. Schramm v. Oakes, 352 F.2d 143, 149 (10th Cir. 1965); Williams v. Minnesota Mining & Manufacturing Co., 14 F.R.D. 1, 5 (S. D. Cal. 1953). The burden of proof rests upon the party asserting existence of jurisdiction, id. at 5; KVOS, Inc. v. Associated Press, 299 U.S. 269, 278, 57 S.Ct. 197, 81 L.Ed. 183 (1936). However, this burden is met by a prima facie showing that jurisdiction is conferred by the long arm statute. United States v. Montreal Trust Co., 358 F.2d 239 (2nd Cir. 1966).

The burden of establishing jurisdiction is on the plaintiff. Weller v. Cromwell Oil Co., 504 F2d 927 (6th Cir. 1974). However, if the district court determines to decide the issue solely on the basis of written materials, the plaintiff should be required only to make a prima facie case of jurisdiction, that is, he need only "demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss." Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1285 (9th Cir. 1977) (citation omitted). Accord: Jetco

Electronic Industries, Inc. v. Gardiner, 473 F. 2d 1228 (5th Cir. 1973). However, if the district court concludes that the written submissions have raised issues of credibility or disputed issues of fact which require resolution, it may conduct a preliminary evidentiary hearing. Where this occurs the plaintiff must show by a preponderance of the evidence that jurisdiction exists. Data Disc, Inc. v. Systems Technology Associates, Inc., supra, 557 F.2d at 1285.

In the present case the district court apparently concluded that the written materials presented no disputed questions of fact on jurisdiction and no issues of credibility. Under these circumstances, the burden of the plaintiff is relatively slight, and the district court "must consider the pleadings and affidavits in the light most favorable to the plaintiff." Poston v. American President Lines, Ltd. 452 F.Supp. 568, 571 (S.D. Fla. 1978) (citation omitted).

Accord: School District of Kansas City v. Missouri, 460 F.Supp. 421, 433 (W.D. Mo. 1978), appeal dismissed, 592 F.2d 493 (8th Cir. 1979); Ammon v. Kaplow, 468 F.Supp. 1304 (D.Kan. 1979).

III.

In determining whether personal jurisdiction exists over a nonresident defendant in a diversity case, a district court applies the law of the state in which it sits subject to due process limitations. It has been determined that the Ohio long arm statute is intended to extend the jurisdiction of its courts to the constitutional limits, at least with respect to the "transaction of any business" provision. See In-Flight Devices Corp. v. Van Dusen Air, Inc., supra, 466 F.2d at 225. The constitutional limit of jurisdiction over nonresidents has been defined by the Supreme Court in a series of cases. The issue was stated by the Court in International Shoe Co. v. Washington, 326

U.S. 310, 316 (1945), in terms of two requirements: there must be minimum contacts with the forum state, and out-of-state service in the particular circumstances must not offend traditional notions of fair play. In Hanson v. Denckla, 357 U.S. 235, 251 (1958), the Court held that a defendant may not be required to defend an action in a foreign tribunal unless he has had "minimal contacts" with the forum state. This requirement was further explained as follows:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington, 326 U.S. 310, 319.

Id. at 253. Both International Shoe Co. v. Washington and Hanson v. Denckla were relied upon by the Supreme Court in its recent

decision in World-Wide Volkswagen Corp. v. Woodson, — — U.S. — —, 100 S.C. 559 (1980). That case involved a suit against nonresident defendants in a tort action.

This court has dealt with the problem of personal jurisdiction over nonresidents in a number of diversity cases seeking damages for breach of contract. E.g., Southern Machine Co. v. Mohasco Industries, Inc., supra (the Tennessee long arm statute); Nationwide Motorist Ass'n of Michigan v. Freeman, 405 F. 2d 699 (1969) (the Michigan statute); King v. Hailey Chevrolet Co., 462 F.2d 63 (1972) (the Tennessee statute); In-Flight Devices Corp. v. Van Dusen Air, Inc., supra; M & W Contractors, Inc. v. Arch Mineral Corp., 466 F.2d 1339 (1972); Weller v. Cromwell Oil Co., supra (all involving the Ohio statute); Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176 (1975) (the Kentucky statute); Capital Dredge & Dock Corp. v. Midwest Dredging Co., 573 F.2d 377 (1978) (the Ohio

statute); Pickens v. Hess, 573 F.2d 380 (1978) (the Tennessee statute). The same tests have been applied to determine the existence of personal jurisdiction over nonresidents in actions for torts committed outside the forum state. E.g., Kroger Co. v. Dornbos, 408 F.2d 813 (6th Cir. 1969); Poyner v. Erma Werke GMBH, 618 F. 2d 1186 (6th Cir. 1980).

The opinion of this court in Southern Machine Co. v. Mohasco Industries, Inc., supra, provides a three-art test for determining whether a given set of circumstances provides sufficient contact between a nonresident defendant and the forum state to support personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction

over the defendant reasonable.

401 F.2d at 381 (footnote omitted).

IV.

In granting the motion to dismiss, the district court compared the facts in the present case with those in Southern Machine and In-Flight Devices, applied the three criteria of Southern Machine, and concluded it lacked personal jurisdiction over Gibbs. Though Southern Machine provides a framework of analysis, it cannot be mechanically applied. A case does not automatically warrant dismissal because its facts do not fit the pattern of Southern Machine, In-Flight Devices, or one of our other decisions. In Velantra v. Regie National Des Usines Renault, 336 F.2d 292, 295 (1964), this court stated:

> The existence or nonexistence of the necessary "minimum contacts" to justify the upholding of personal jurisdiction over foreign corporations under the Fourteenth Amendment as interpreted in the International Shoe Company case must obviously be worked out with reference to the facts of a particular case rather than in a statement of dogmatic rules of all-

inclusive principles.

As the district court found, the defendant Gibbs purposefully availed himself of business opportunities and contacts in the State of Ohio. He made the first contact with plaintiff Welsh and followed up with a call to Welsh after their first discussion of the invention. Further, he entered into a contract which contemplated development of the invention and production of switch units in Ohio by an Ohio corporation. The district court found, however, there was "no showing that the business operations of the plaintiffs have had a realistic impact of the commerce of the State of Ohio." This is an action for misrepresentation and breach of contract. The entire tenor of the plaintiffs' claim is that successful production of the new switch units would have had a significant impact on the commerce of Ohio. Plaintiffs assert that the invention was represented as one

which would revolutionize a substanatial existing industry. The fact that no previously operating facilities in Ohio were deprived of revenue because of the defendant's alleged breach is of no importance. The contract required the formation of a new corporation dedicated solely to developing, producing and marketing defendant's invention. If the invention had been what the plaintiffs allege the defendant represented it to be, Flo-Start, Inc. would have added appreciably to the commerce of Ohio.

The district court also found that the plaintiffs "failed to show that the claim arose from defendant's activities in Ohio as required by the second prong of the test." This finding was based largely on the court's reading of Welsh's affidavit which referred to misrepresentations allegedly made by Gibbs in Florida. We believe this is too narrow a reading of the record. As we have pointed out, the pleadings and affidavits

must be construed most favorably to the one against whom the motion to dismiss has been made. When the complaint and the October 31, 1974 contract attached as an exhibit are read along with the affidavit of Welsh it is clear that the plaintiffs are alleging a series of misrepresentations, some of which were made in Ohio. An example is contained in paragraphs 7 and 8 of the complaint, which refer to events that took place in Akron:

> 7. At the time of the purchase of the Letters Patent and collateral rights in respect of the Mercury Contacts Control Unit, Defendant demonstrated and delivered to Plaintiffs a prototype model thereof. The prototype model was sufficiently complete to permit simulation of the operation of the Mercury Contacts Control Unit if produced in accordance with the designs of the Defendant for the Invention. Defendant demonstrated the prototype Mercury Contacts Control Unit to the Plaintiff Welsh and provided an appearance thereby of successful and easy operation in accordance with the advantages asserted by Defendant for the invention.
>
> 8. Defendant represented to Plaintiffs that the prototype of the

> Mercury Contacts Control Unit had been adequately tested and had no known hazards or defects in operation. Such representations were knowingly false.

The district court erred in weighing the two Ohio contacts against the five trips which Welsh or his agents made to Florida and determining therefrom that the Ohio contacts were not sufficiently significant to support a finding that the claim arose out of defendant's activities in Ohio.

Finally, the district court held that "the quality and frequency of defendant's contacts with Ohio viewed in their overall context will not sustain the exercise of jurisdiction over the defendant's person." The primary basis for this holding appears to be the court's finding that, apart from payment of the contract price, there is no continuing relationship between the parties. This finding is not supported by the record. It is true that Gibbs did not retain control over the production or marketing of his

invention. However, he was bound by the contract to assist in obtaining patents for future inventions and discoveries related to the one already patented. Furthermore, the defendant was required to advance the "technical understanding" of the invention by the plaintiffs and to assist them in perfecting a production model. This contract cannot be fairly read to mean that Gibbs would have no relationship with the plaintiffs after the required ten days of work with the engineers in preparing a working model.

On the entire record before us we conclude that the plaintiffs established a prima facie case of personal jurisdiction over the defendant. There were minimum contacts with Ohio, and out-of-state service under the circumstances here shown did not offend traditional notions of fair play. International Shoe Co. v. Washington, supra.

The judgment of the district court is

reversed and the cause is remanded for further proceedings.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3016

FILED: October 2, 1980
John P. Hehman, Clerk

JOHN WELSH and FLO-START, INC.,

Plaintiffs-Appellants,

-vs-

JAMES W. GIBBS,

Defendant-Appellee

Before: LIVELY and ENGEL, Circuit Judges; and BALLANTINE, District Judge.

J U D G M E N T

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that

the judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

Signed by Clerk

Issued as Mandate: November 18, 1980

COSTS: None

Filing fee.....$

Printing $

Total $

A True Copy

Attest:

Signed by Deputy Clerk

CONTIE, J.
(7)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

JOHN WELSH FLO-START, INC. Plaintiffs -vs- JAMES W. GIBBS Defendant	)	Civil Action: C78-98A ORDER

The present action is before the Court upon defendant's motion to dismiss for lack of in personam jurisdiction. Upon consideration and for the reasons stated below, said motion shall be granted.

Plaintiffs, John Welsh and Flo-Start, Inc., are residents of Ohio and have their principal places of business in that state. Defendant is a citizen of the state of Florida. This Court has subject matter jurisdiction over the present controversy

based upon diversity of citizenship.

The first contact between the parties was in early 1974 when the defendant Gibbs called plaintiff Welsh about an electrical control unit he had developed to control electrically operated carts, trucks, and other vehicles. Plaintiff Welsh made a trip to Florida to discuss the invention with the defendant. Later in 1974 the defendant again called the plaintiff who made another trip to Florida to discuss possible purchase of the invention. According to the affidavit filed by plaintiff Welsh, it was at this second meeting in mid-August 1974 that material representations were made by the defendant which were subsequently discovered to be false. The alleged misrepresentations are the basis of the present suit. (The defendant's affidavit describes a third meeting in Florida between plaintiff's agents, plaintiff's attorney and patent attorney,

and defendant, his attorney and patent attorney.)

The next contact between the parties was in early September when defendant brought a proto-type of the invention to plaintiff Welsh in Ohio. After signing a non-disclosure agreement in Akron, the defendant returned to Florida with the model. Plaintiff and defendant next met in Florida for negotiations extending over several days. Finally, plaintiff Welsh and his agents returned to Florida and signed the contract of sale. After the contract was signed, plaintiff and his agents remained in Florida to contract with a Florida engineering firm to do some development work, and to discuss further development with another Florida company. Under the contract, defendant was required to assist in development for thirty days in Akron or elsewhere; in fact, defendant spent sixty days working with the Florida

engineering firm hired by plaintiffs.

When federal jurisdiction is based upon diversity of citizenship it is necessary to look to the long-arm statute of the forum state to determine whether in personam jurisdiction is appropriate. Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 376 n.2 (6th Cir. 1968). The relevant portion of Ohio's long-arm statute, ORC § 2307.382, is as follows:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or goods in this state; ...

In adopting its long-arm statute, the Ohio legislature expanded the in personam jurisdiction of Ohio's courts to the full extent allowable by the due process clause

of the Fourteenth Amendment. In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 225 (6th Cir. 1972). This Court must, therefore, decide whether the exercise of in personam jurisdiction in the present case would violate the due process clause of the Fourteenth Amendment. Southern Machine, supra, at 377-78.

The burden of proof to establish jurisdiction over the defendant is upon the plaintiffs. Weller v. Cromwell Oil Company, 504 F2d 927, 929 (6th Cir. 1974).

In Southern Machine, the Court of Appeals adopted a three-pronged test for determining the limits of due process in this context:

> First the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Southern Machine, supra at 381 (footnote

omitted).

The court in Southern Machine further elaborated on the first prong of the test explaining that:

> business is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state.

Southern Machine, supra at 382-83 (footnote omitted). In the instant case the defendant Gibbs initiated the contract negotiations with the plaintiff Welsh in Ohio. Furthermore, the defendant entered into a contract with the plaintiff Welsh which expressly contemplated the foremation of an Ohio corporation. The Ohio corporation was solely to develop, produce, and market the invention being purchased from defendant, and was solely responsible to pay $1,900,000 of the $2,000,000 purchase price.

Thus, defendant purposely availed himself of business contacts and opportunities in the state of Ohio, and defendant could reasonably have foreseen that the transaction would have consequences in that state.

The Court finds, however, that the first part of the test has not been met because there has been no showing that the business operations of the plaintiffs have had a realistic impact on the commerce of the state of Ohio. Even if Flo-Start planned to set up its manufacturing plant in Ohio, production is contingent upon further development of the product. In contrast, the contracts involved in In-Flight and Southern Machine were made with a going concern, already engaged in manufacturing in the forum state; fulfilling the contracts would, therefore, have direct and immediate impact on commerce in the forum state. The work required to develop defendant Gibbs' inven-

tion could have had impact on commerce in Ohio, except that defendant's affidavit reveals that an engineering firm in Florida was hired for this work.

Plaintiffs have further failed to show that the claim arose from defendant's activities in Ohio as required by the second prong of the test. Plaintiffs claim damages as a result of reliance on defendant's statements allegedly known to be false. Yet in his affidavit plaintiff Welsh states that the statements in question were made in Florida. If the plaintiffs' claim is construed more broadly, the defendant's phone calls and visit to Ohio can be made part of the entire chain of events giving rise to the claim. Yet when placed in the context of the five trips to Florida made by plaintiff Welsh and/or his agents (many of which extended over several days), and considering the period of sixty days during which the defendant worked on develop-

ment with the Florida engineers hired by plaintiffs, it is difficult to characterize this claim as arising out of defendant's activity in Ohio.

Turning briefly to the third part of the inquiry outlined in Southern Machine, the quality and frequency of defendant's contacts with Ohio viewed in their overall context will not sustain the exercise of jurisdiction over the defendant's person. Unlike defendant Mohasco, defendant Gibbs has not retained substantial control over the manufacture and marketing of the invention, and--apart from payment of the stated contract price--there is no continuing relationship between the parties. In Capital Dredge and Dock Corp. v. Midwest Dredging Co. No. 77-3122 (6th Cir. April 5, 1978), defendant had contracted with an Ohio company, bonded in Ohio, to do work in Illinois. It was later necessary to renegotiate the contract and bond, and

though the final contract was delivered to Ohio and the check received there, this was held not to constitute the requisite minimum contacts. Defendant Gibbs' contacts with the state of Ohio are similarly casual.

Plaintiffs also claim that defendant is subject to the jurisdiction of this Court because he contracted to supply services or goods in this state. Defendant did deliver a model of the invention to Ohio, and did contract to work on development in Ohio if that was required. As it turned out, the services required of defendant under the contract were not performed in Ohio. Nor is defendant under any continuing obligation to perform services for plaintiffs in Ohio, or to deliver any goods.

Accordingly, defendant's motion to dismiss and quash service of process is hereby granted.

IT IS SO ORDERED.

Signed by Leroy J. Contie,
Jr., U. S. District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

FILED: October 3, 1978

JOHN WELSH FLO-START, INC. Plaintiffs -vs- JAMES W. GIBBS Defendant	)	Civil Action: C78-98A JUDGMENT ENTRY

The Court having granted defendant's motion to dismiss for lack of personal jurisdiction,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff's complaint is hereby dismissed. Each party to bear his own costs.

Signed by Leroy J. Contie, Jr., U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN WELSH 1136 Linmar Drive North Canton, Ohio 44720	)	CASE NO: C78-98A
and	)	Judge Contie
FLO-START, INC. 265 South Main Street Akron, Ohio	)	COMPLAINT
Plaintiffs	)	
-vs-	)	
JAMES W. GIBBS 8027 West 14th Avenue Hialeah, Florida 33014	)	
Defendant	)	

The Plaintiffs, John Welsh and Flo-Start, Inc., state for their Complaint as follows:

1. Plaintiffs are citizens of the State of Ohio and have their principal places of business in that state. Defendant is a citizen of the State of Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00). The jurisdiction of

this court is conferred pursuant to 28 U.S.C. § 1332.

2. The claim which is the subject of this Complaint arose from tortious injuries caused by acts or omissions in this state.

3. On October 31, 1974, Plaintiff Welsh purchased from Defendant Gibbs an invention consisting of an electrical control unit employing movable mercury contacts and accompanying mechanism for the control of electrically operated carts, trucks and other vehicles and machines (hereinafter, "Mercury Contacts Control Unit") together with certain collateral rights and benefits in connection therewith under a contract, a copy of which is attached hereto as EXHIBIT "A". The Mercury Contacts Control Unit employed movable liquid contacts in the form of pools of mercury in a control for instituting and regulating the flow of electrical energy from a power source such as a battery to a driven unit such as a

motor which converts electrical energy to a mechanical output.

4. Plaintiffs have performed all conditions of said contract required to be performed by them.

5. The purported benefits of the Mercury Contacts Control Unit according to the Defendant was an improved, smooth, nonarcing initiation and variation of current flow for electrically operated motors. Defendant had obtained Letters Patent, had a pending patent application and had a patent application in the process of preparation on developments relating to the Mercury Contacts Control Unit, all of which were assigned to Plaintiff Welsh pursuant to the 1974 agreement. The benefits and advantages of the Mercury Contacts Control Unit if achievable in accordance with the representations of the Defendant would have been sufficient to permit the development of a large and profitable market therefor

and would have rendered virtually obsolete the solid contact electrical control units commonly employed in electrically operated carts, trucks, and other vehicles and machines.

6. As provided in their 1974 agreement, Plaintiff Welsh assigned the rights that had been obtained to the Mercury Contacts Control Unit to the Plaintiff Flo-Start, Inc. in exchange for all of its capital stock. Thereafter, Plaintiffs expended great sums of money, effort and time in attempting to develop a production model of the Mercury Contacts Control Unit and in market development as contemplated by the parties. Moreover, Plaintiff Welsh paid to the Defendant the sum of $100,000 in accordance with the terms of the 1974 agreement.

7. At the time of the purchase of the Letters Patent and collateral rights in respect of the Mercury Contacts Control Unit,

Defendant demonstrated and delivered to Plaintiffs a prototype model thereof. The prototype model was sufficiently complete to permit simulation of the operation of the Mercury Contacts Control Unit if produced in accordance with the designs of the Defendant for the Invention. Defendant demonstrated the prototype Mercury Contacts Control Unit to the Plaintiff Welsh and provided an appearance thereby of successful and easy operation in accordance with the advantages asserted by Defendant for the invention.

8. Defendant represented to Plaintiffs that the prototype of the Mercury Contacts Control Unit had been adequately tested and had no known hazards or defects in operation. Such representations were knowingly false.

9. Unknown to the Plaintiffs, the Mercury Contacts Control Unit was in fact unsafe and defective. Although failure of the mechanism would not occur under certain

operating conditions, the Mercury Contacts Control Unit could not be operated under all necessary operating conditions without deleterious arcing and/or loss of integrity of the pools of mercury. Under some routine operating conditions the pools of liquid mercury could be vaporized and ignited causing not only a destruction or portions of the Mercury Contacts Control Unit but possible damage to the machine and/or electrical motor to which it was connected and endagering persons and property in the immediate vicinity. Defendant Gibbs knew of such hazard and purposefully concealed the defect through skillfully controlled operation of the prototype model in demonstration to the Plaintiff.

10. The Mercury Contacts Control Unit was also inherently defective by reason of inadequate containment of liquid mercury and mercury vapor within the Mercury Contacts Control Unit. The escape of mercury thus not only defeated the utility of the

mechanism but also caused it to be dangerous for use because of poisonous inhalation by anyone constructing, operating, or coming within its immediate vicinity. Defendant Gibbs knew or should have known of the fact that the design of the Mercury Contacts Control Unit was not adequate to prevent escape of liquid mercury and/or mercury vapor both while the Mercury Contacts Control Unit was being operated and while it was not being operated.

11. Upon discovery of these defects, Plaintiffs, in good faith, attempted to remedy the defects of the Mercury Contacts Control Unit and to that end employed expert engineers to attempt to overcome what then appeared to be basic design defects. Notwithstanding the expenditure of great sums of money therefor, Plaintiffs have been unable to remedy the defects of the design and have been advised that the defects cannot be remedied by known practical

engineering and the Mercury Contacts Control Unit is, on that account, worthless.

12. Both the representations and non-disclosures of material facts by the Defendant as set forth hereinabove were made by the Defendant with knowledge of the falsity and with the intent of misleading the Plaintiffs into relying upon them. The Plaintiffs did so rely upon said representations and non-disclosures and as a consequence thereof, injury resulted as hereinafter described.

13. By virtue of the foregoing facts, the Defendant has breached its contract with the Plaintiffs and as a direct and proximate result of said breach, the Plaintiffs have been damaged as next set forth.

14. Plaintiffs have been damaged by the actions of the Defendant as herein described in amounts not less then $1,000,000.

WHEREFORE, Plaintiffs demand recovery against the Defendant for actual damages,

together with punitive damages in the amount of $500,000, and attorneys' fees, together with the costs of this action.

Signed by Atty. John M. Glenn

Signed by Atty. Steven E. Sigalow

Attorneys for Plaintiffs

Of Counsel:

BUCKINGHAM, DOOLITTLE & BURROUGHTS CO., LPA
1500 I Cascade Plaza
Akron, Ohio 44308
(216) 376-5300

Dated:

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

JOHN WELSH FLO-START, INC. Plaintiffs -vs- JAMES W. GIBBS Defendant	)	Civil Action C 78-98 A Judge Leroy J. Contie, Jr. AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND TO QUASH SERVICE OF PROCESS

BEFORE ME, the undersigned authority, personally appeared JAMES W. GIBBS, who after being by me first duly sworn and cautioned to tell the truth, deposes and says:

1. The Defendant has not caused tortious injury in the State of Ohio by any act or omission within nor without of the State of Ohio nor does he regularly do or solicit business, or engage in any other persistant course of conduct or

derive substantial revenue from goods used or conserved or services rendered in the State of Ohio.

2. The Defendant has not caused injury in the State of Ohio to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State of Ohio when he might reasonably have expected such persons to use, consume, or be affected by the goods in the State of Ohio and further he does not nor has not regularly do or solicit business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the State of Ohio.

3. That he is a resident of the State of Florida and at all times relative to the subject matter of this litigation was a resident of the State of Florida and maintain his residence at 8027 West 14th Avenue, Hialeah, Dade County, Florida, 33014.

4. That at all times relevant to the subject matter of this litigation the business facilities that he did maintain were located in Hialeah, Dade County, Florida or the adjacent municipality of Opa Locka, Dade County, Florida.

5. The invention which is the subject matter of this litigation was in fact developed in the State of Florida.

6. The patenting process for the inventions that are the subject matter of this litigation was in fact processed from the State of Florida.

7. The Plaintiffs were introduced to the Defendant through relatives of the Plaintiff in Ft. Lauderdale, Broward County (the adjoining County), Florida, whom also was the President of the Company represented by the Plaintiff to have been founded by the Plaintiff and formerly headed by the Plaintiff.

8. The Defendant's first personal

meeting with the Plaintiffs was with their agents for two (2) days at the Defendant's facility in Dade County, Florida.

9. The Defendant's next meeting with the Plaintiffs was with Plaintiff Welsh and his agents for one half (1/2) day at the Ft. Lauderdale company founded by and formerly headed by Plaintiff Welsh and presently headed by his cousin.

10. Defendant's next contact with the Plaintiffs, was while Defendant along with wife and son were on vacation and driving to New Jersey, where they were invited by Plaintiff's agent to "stop by and see the facilities of one of Welsh's companies", (this company was unrelated to this subject transaction) for one (1) day, after which Defendant and family proceeded on their vacation and on to New Jersey.

11. Defendant's next contact with Plaintiffs was when Plaintiffs' agents, Attorney, and Patent Attorney visited Defen-

dant for two (2) days in Dade County, Florida, and reviewed the status of the invention, and their patents with Defendant, his Attorney and Defendant's Patent Attorney.

12. Mere happenstance dictated the Defendant's next contact with the Plaintiff and the Plaintiff's agents in that while going to a demonstration at Grove City, Pennsylvania, airline scheduling of the Defendant and other interested parties dictated their flying to Akron and driving over to Grove City, Pennsylvania by rental car. On their return from Grove City to Miami it was convenient to spend 1 or 2 hours to drop off the proto-type model of the invention, while passing through, for the Plaintiffs to make all and any use of in determining their interest.

13. Defendant's next contact with the Plaintiff was at Welsh's second trip to meet Defendant for negotiations in Miami which lasted two (2) days, (Defendant is una-

ware of other trips to Florida by Plaintiff due to possibility of Plaintiff's business activity or due to Plaintiff's property interest within Florida).

14. Defendant's next contact with the Plaintiffs was four (4) days negotiation, review and development work with Plaintiffs' agents at the time the Plaintiffs and Defendant executed the subject contracts here in Hialeah, Florida.

15. Defendant's next contact with Plaintiff, Welsh, was the third (3rd) and fourth (4th) day of the four (4) days referred to in Paragraph 14 when Plaintiff executed the contract in Hialeah, Florida and thereafter instructed his agents to stay on in Miami and contract for the development of the subject invention with one Tampa Bay Engineering of Coral Gables, Dade County, Florida and discussed further development with Plastic Application of Pompano Beach, Broward County, Florida.

16. The Defendant worked with the Plaintiff and his agents during the four (4) days referred to in Paragraph 15 and 16 until Plaintiff did in fact contract for the development with Tampa Bay Engineering, in Dade County, Florida.

17. Pursuant to the terms of the principle contract whereby the Defendant was required to provide ten (10) days unpaid services in assisting with the development of the subject invention "in Akron or ELSEWHERE", (Page 8, Paragraph E of the contract), the Defendant did in fact spend at the request of the Plaintiff the majority of the next sixty (60) D A Y S in Dade County, Florida, assisting the contracted Dade County engineering firm, and a continuous in and out of the Plaintiff's agents, in compliance with the terms of the agreement and carrying out at the Plaintiff's request, including material procurring, pricing, etc. the instructions of the Plaintiff.

18. The Defendant's next contact with the State of Ohio was to see the patent Attorney who was engaged by the Defendant for professional services paid for by the Defendant and unrelated to the subject of this litigation, in that Defendant was impressed by said Attorney when said Attorney was in Dade County on behalf of Plaintiffs.

19. Defendant's next contact was with the President of Plaintiffs' company when he flew to Florida and contacted the plastics manufacturing company and the Defendant in Broward and Dade Counties, Florida.

20. Defendant's next contact with Ohio, again not relative to this subject matter in that payment had been completed by mail to Defendant's address in Hialeah, Florida was when Defendant flew to Akron to cash the payment check at an Akron Bank, at which time no contacts were made with any other parties or their agents.

21. The term contacts in this Affidavit

refers to physical persons and excludes telephone calls or telegram which may or may not have transpired at the imputious of either party.

FURTHER AFFIANT SAITH NAUGHT AND PREPARETH FOR HIS SIGNATURE.

Signed by James W. Gibbs

STATE OF FLORIDA

COUNTY OF DADE

The foregoing instrument was acknowledged before me this 13th day of June, 1978 by JAMES W. GIBBS.

NOTARY PUBLIC

My Commission Expires:

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

JOHN WELSH, FLO-START, INC.	)	Civil Action C 78-98 A
Plaintiffs	)	JUDGE LEROY J.
vs.	)	CONTIE, JR.
JAMES W. GIBBS	)	AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND TO QUASH SERVICE OF PROCESS
Defendant	)	

BEFORE ME, the undersigned authority, personally appeared JAMES M. FLATEAU, who after being by me first duly sworn and cautioned to tell the truth, deposes and says:

1. The Defendant has not caused tortious injury in the State of Ohio by any act or omission within nor without of the State of Ohio nor does he regularly do or solicit business, or engage in any other persistent course of conduct or derive substantial revenue from goods used or con-

served or services rendered in the State of Ohio.

2. The Defendant has not caused injury in the State of Ohio to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State of Ohio when he might reasonably have expected such persons to use, consume, or be affected by the goods in the State of Ohio and further he does not nor has not regularly do or solicit business or engages in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered in the State of Ohio.

3. That he is a resident of the State of Florida and at all times relative to the subject matter of this litigation was a resident of the State of Florida and maintained his residence at 1335 West 30th Street, Hialeah, Dade County, Florida, 33012.

4. That at all times relevant to the

subject matter of this litigation he was employed by the Defendant in the business facilities that were located in Hialeah, Dade County, Florida or the adjacent municipality of Opa Locka, Dade County, Florida.

5. The invention which is the subject matter of this litigation was in fact developed in the State of Florida.

6. The patenting process for the inventions that are the subject matter of this litigation was in fact processed from the State of Florida.

7. The Plaintiffs were introduced to the Defendant through relatives of the Plaintiff in Ft. Lauderdale, Broward County (the adjoining county), Florida, whom also was the President of the Company represented by the Plaintiff to have been founded by the Plaintiff and formerly headed by the Plaintiff.

8. The Defendant's first personal meeting with the Plaintiffs was with their

agents for two (2) days at the Defendant's facility in Dade County, Florida.

9. The Defendant's next meeting with the Plaintiffs, was with Plaintiff Welsh and his agents for one half (1/2) days at the Ft. Lauderdale Company founded by and formerly headed by Plaintiff Welsh and presently headed by his cousin.

10. Defendant's next contact with the Plaintiffs, was while Defendant along with wife and son were on vacation and driving to New Jersey, where they were invited by Plaintiffs agent to "stop by and see the facilities of one of Welsh's companies", (this company was unrelated to this subject transaction) for one (1) day, after which Defendant and family proceeded on their vacation and on to New Jersey.

11. Defendant's next contact with Plaintiffs was when Plaintiffs' agents, Attorney, and Patent Attorney visited Defendant for two (2) days in Dade County, Florida, and

reviewed the status of the invention, and their patents with Defendant, his Attorney and Defendant's Patent Attorney.

12. Mere happenstance dictated the Defendant's next contact with the Plaintiff and the Plaintiff's agents in that while going to a demonstration at Grove City, Pennsylvania, airline scheduling of the Defendant and other interested parties dictated their flying to Akron and driving over to Grove City, Pennsylvania by rental car. On their return from Grove City to Miami it was convenient to spend 1 or 2 hours to drop off the proto-type model of the invention, while passing through, for the Plaintiffs to make all and any use of in determining their interest.

13. Defendant's next contact with the Plaintiff was at Welsh's second trip to meet Defendant for negotiations in Miami which lasted two (2) days, (Defendant is unaware of other trips to Florida by Plain-

tiff due to possibility of Plaintiff's business activity or due to Plaintiff's property interest within Florida).

14. Defendant's next contact with the Plaintiffs was four (4) days negotiation, review and development work with Plaintiffs' agents at the time the Plaintiffs and Defendant executed the subject contracts here in Hialeah, Florida.

15. Defendant's next contact with Plaintiff, Welsh, was the third (3rd) and fourth (4th) day of the four (4) days referred to in Paragraph 14 when Plaintiff executed the contract in Hialeah, Florida and thereafter instructed his agents to stay on in Miami and contract for the development of the subject invention with one Tampa Bay Engineering of Coral Gables, Dade County, Florida and discussed further development with Plastic Application of Pompano Beach, Broward County, Florida.

16. The Defendant worked with the

Plaintiff and his agents during the four (4) days referred to in Paragraph 15 and 16 until Plaintiff did in fact contract for the development with Tampa Bay Engineering, in Dade County, Florida.

17. Pursuant to the terms of the principal contract whereby the Defendant was required to provide ten (10) days unpaid services in assisting with the development of the subject invention "in Akron or ELSWWHERE," (Page 8, Paragraph E of the contract), this Affiant in addition to the Defendant did in fact spend at the request of the Plaintiff approximately sixty (60) D A Y S in Dade County, Florida, assisting the contracted Dade County Engineering firm, and a continuous in and out of the Plaintiff's agents, in compliance with the terms of the agreement and carrying out at the Plaintiff's request, including material procurring, pricing, etc., the instructions of the Plaintiff.

18. The Defendant's next contact with the State of Ohio was to see the patent Attorney who was engaged by the Defendant for professional services paid for by the Defendant and unrelated to the subject of this litigation, in that Defendant was impressed by said Attorney when said Attorney was in Dade County on behalf of Plaintiffs.

19. Defendant's next contact was with the President of Plaintiffs' company when he flew to Florida and contacted the plastics manufacturing company and the Defendant in Broward and Dade Counties, Florida.

20. Defendant's next contact with Ohio, again not relative to this subject matter in that payment had been completed by mail to Defendant's address in Hialeah, Florida was when Defendant flew to Akron to cash the payment check at an Akron Bank, at which time no contacts were made with any other

parties or their agents.

21. The term contacts in this Affidavit refers to physical persons and excludes telephone calls or telegram which may or may not have transpired at the imputious of either party.

FURTHER AFFIANT SAITH NAUGHT AND PREPARETH FOR HIS SIGNATURE.

Signed by James M. Flateau

STATE OF FLORIDA

COUNTY OF DADE

The foregoing instrument was acknowledged before me this 13th day of June 1978 by JAMES M. FLATEAU.

Notary Public

My Commission Expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN WELSH, et al	)	
	)	CASE NO: C78-98A
Plaintiffs	)	
	)	Judge Leroy J. Contie,
v.	)	Jr.
	)	
JAMES W. GIBBS	)	A F F I D A V I T
	)	
Defendant	)	

John Welsh, having been duly sworn, deposes and says as follows:

1. That he is the Plaintiff in the above-captioned matter and that at all times material hereto he was the Chairman of the Board of the Defendant Flo-Start, Inc.

2. That prior to the incorporation of the Defendant Flo-Start, Inc. in October, 1974, he was the President of J.K.R. Corporation, an Ohio corporation for profit, and the sole proprietor of Omnitronics, an Ohio business located at 265 South Main Street, Akron, Ohio.

3. That in early 1974 he was contacted in Akron, Ohio by either James W. Gibbs, the

Defendant herein, or his agent, Richard Rudolph, with respect to a certain electrical control unit (here after "invention") that Defendant Gibbs had purportedly invented and was now attempting to sell.

4. That as a result of this contact he traveled to the State of Florida to meet with Defendant Gibbs and his agents. No agreement was reached at this meeting with respect to the invention.

5. That in August, 1974, Defendant Gibbs once again contacted the affiant in Akron, Ohio and as a result thereof, the Plaintiffs' agents went to the State of Florida to further discuss and negotiate terms and conditions respecting the sale of the invention.

6. That at this meeting in Florida in mid-August, 1974, certain material representations of fact were made in the Defendant to Plaintiffs' agents with respect to the performance of the invention and the results

of certain testing procedures with respect to the same. These material representations of fact made by the Defendant were subsequently discovered to be false.

7. That as a result of the material representations of fact made by the Defendant to Plaintiff and his agents the negotiations with respect to the sale and purchase of the invention continued. That on or about September 6, 1974, Defendant Gibbs came to Akron, Ohio to further pursue said negotiations.

8. That on or about September 6, 1974, the parties entered into a nondisclosure agreement in Akron, Ohio with respect to said invention; said agreement was subsequently supersdeded by the contract of October 31, 1974. That at the September 6, 1974 meeting in Akron, Ohio whereat said nondisclosure agreement was executed, Defendant Gibbs provided Plaintiffs with a view of a prototype of the invention. Said prototype was not left by Defendant Gibbs in Akron,

Ohio, but instead, was returned by him to Florida.

9. That as a result of the preliminary negotiations conducted within both the States of Ohio and Florida, the Plaintiffs and its agents and the Defendant and his agents met in late October, 1974 in the State of Florida to consummate a contract for the sale and purchase of the invention.

10. That said contract (attached to Plaintiffs' Complaint) contemplated and compelled the formation of an Ohio corporation for profit called Flo-Start, Inc., which would be devoted entirely to the development, production and marketing of said invention (See Contract Sections I., J., and K.)

11. That Flo-Start, Inc., was incorporated on or about October 1, 1974 in anticipation of the contract later signed between the affiant and Defendant Gibbs on October 31, 1974. That Flo-Start, Inc., was located at 265 South Main Street, Akron, Ohio and all

development, production and marketing of said invention was to be done from said location.

12. That the project to develop, produce and market the invention, if it had been successful, would have revolutionized the control of electrically operated carts, trucks, etc. and as a consequence thereof, substantial commerce would have been generated within the State of Ohio and nationwide.

13. That it was the intent of the signatories to said contract that all disputes arising thereunder be litigated, if necessary, in the State of Ohio and in effectuation of said intent, provision V-D was included within said contract which provides that the agreement shall be construed according to the laws of the State of Ohio.

14. That subsequent to the signing of the contract on October 31, 1974, the testing and development of the invention by Plaintiffs indicated and proved that the representations made by Defendant Gibbs with

respect to the performance of the invention were false. Said development and testing proved that the invention was unfit for its stated purpose, contrary to the representations of Defendant Gibbs, and as a consequence thereof the project to develop, produce and market said invention was abandoned.

Further affiant saith naught.

Signed by John Welsh

State of Ohio)
) SS
Summit County)

Sworn to before me and subscribed in my presence by the said John Welsh, this 17th day of July, 1978.

Notary Public